

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEVADA  
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4 Romulo Antonio Portillo,  
5 Plaintiff  
6 v.  
7 United States of America,  
8 Defendants  
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2:17-cv-00394-JAD-GWF

**Order Granting Motion to Dismiss and  
Closing Case**

[ECF No. 22]

10 Plaintiff Romulo Portillo sues the United States of America under the Federal Tort  
11 Claims Act (FTCA) for the Federal Bureau of Prison's (BOP) alleged miscalculation of his time  
12 in incarceration. Portillo has already been given one opportunity to amend his complaint.  
13 Because I lack subject matter jurisdiction over his claim, I dismiss the amended complaint and  
14 close this case.

15 **Background**

16 Portillo alleges that he was prosecuted by federal authorities in the United States District  
17 Court for the District of Columbia.<sup>1</sup> He pled guilty to one of the five counts in the indictment,  
18 and he was sentenced by United States District Judge Royce C. Lamberth.<sup>2</sup> On September 9,  
19 2013, Judge Lamberth imposed a 66-month sentence, with 18 months to be credited for time  
20 already served in El Salvador and 22 months to be credited for time served in the United States  
21 prior to pleading guilty.<sup>3</sup> After those time-served credits were applied, Portillo would be  
22 sentenced to an actual term of 26 months, minus any good-time credits applied later.<sup>4</sup>

23 On May 7, 2015, Judge Lamberth issued an order finding that the BOP had "refused to  
24 give [Portillo] credit for the 18 months served in El Salvador," in violation of his sentencing  
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26 <sup>1</sup> ECF No. 21 at 3.

27 <sup>2</sup> *Id.*

28 <sup>3</sup> *Id.*

<sup>4</sup> *Id.*

1 order.<sup>5</sup> Judge Lamberth ordered Portillo’s sentence reduced to time served, and the BOP released  
2 him the next day.<sup>6</sup>

3 When Portillo was released on May 8, 2015, approximately 20 months had passed—six  
4 months short of the term imposed by Judge Lamberth. However, Portillo alleges that he was  
5 entitled to 9 months and 15 days of good-time credit, meaning that his actual sentence should  
6 have been 16 months and 14 days.<sup>7</sup> Based on his calculations, he argues that he was  
7 “incarcerated 3 months longer than necessary.”<sup>8</sup>

8 Portillo alleges tort actions for negligence and intentional infliction of emotional distress  
9 under the FTCA, to redress the BOP’s failure to “ensure that his incarceration would be no  
10 longer than necessary.”<sup>9</sup> The government moves to dismiss the complaint for lack of subject  
11 matter jurisdiction, or alternatively, for failure to state a claim.<sup>10</sup> I agree that I lack subject matter  
12 jurisdiction over this claim because it cannot be raised under the FTCA, and therefore sovereign  
13 immunity protects the United States from Portillo’s suit.

## 14 Discussion

### 15 A. Legal standards

16 “Sovereign immunity is an important limitation on the subject matter jurisdiction of  
17 federal courts. The United States, as sovereign, can only be sued to the extent it has waived  
18 sovereign immunity.”<sup>11</sup> The question of whether sovereign immunity has been waived must be  
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21 <sup>5</sup> *Id.*

22 <sup>6</sup> *Id.*

23 <sup>7</sup> *Id.*

24 <sup>8</sup> *Id.*

25 <sup>9</sup> *Id.* at 4.

26 <sup>10</sup> ECF No. 22.

27 <sup>11</sup> *Vacek v. U.S. Postal Serv.*, 447 F.3d 1248, 1250 (9th Cir. 2006).  
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1 strictly construed in favor of the United States.<sup>12</sup>

2 “The FTCA acts as a waiver of the United States’ traditional sovereign immunity for  
3 certain torts committed by its employees.”<sup>13</sup> It allows tort claims for actions that, under the state  
4 law of the place where the act or omission took place, a private individual could be found liable  
5 for under like circumstances.<sup>14</sup> When determining whether a private analogue to a public  
6 official’s actions exists, a court must determine whether a private person could be liable under  
7 similar or corresponding circumstances.<sup>15</sup> “To recover under the FTCA, the [plaintiff] must  
8 show the government’s actions, if committed by a private party, would constitute a tort [under  
9 state law].”<sup>16</sup> Also, “[t]he breach of duty created by federal law is not, by itself, actionable under  
10 the FTCA.”<sup>17</sup>

11 **B. Portillo’s allegations do not amount to an FTCA claim.**

12 Portillo’s square facts do not fit into the round hole of the FTCA. He maintains that the  
13 BOP’s failure to follow Judge Lamberth’s initial sentencing order and its negligence in properly  
14 calculating his sentence amount to breaches of a duty owed to prisoners. Portillo cites D.C. Code  
15 § 24-442 for the proposition that the District of Columbia imposes a duty to “exercise reasonable  
16 care in the safekeeping of prisoners.”<sup>18</sup>

17 First, Portillo’s basis for this “duty” stems from District of Columbia Code § 24-442, a  
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19 <sup>12</sup> *Dep’t of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999).

20 <sup>13</sup> *Delta Savings Bank v. United States*, 265 F.3d 1017, 1024 (9th Cir. 2001) (*citing* 28 U.S.C.  
21 §§ 1346(b), 2674).

22 <sup>14</sup> *See* 28 U.S.C. § 1346(b).

23 <sup>15</sup> *Indian Towing Co. v. United States*, 350 U.S. 61, 64 (1955); *Olson v. United States*, 546 U.S.  
24 43, 46–47 (2005).

25 <sup>16</sup> *Love v. United States*, 60 F.3d 642, 644 (9th Cir. 1995) (citations omitted).

26 <sup>17</sup> *Id.*

27 <sup>18</sup> ECF No. 25 at 3. Both parties appear to agree for the purposes of this motion that District of  
28 Columbia law applies to Portillo’s claims. *See id.*, ECF No. 26 at 2.

1 law that no longer exists.<sup>19</sup> The only precedential support Portillo gives for this duty is a 1997  
2 case involving alleged medical malpractice on an incarcerated plaintiff.<sup>20</sup> And Portillo fails to  
3 make the connection between the questionably existent duty for DOC officials to provide  
4 reasonable care in the safekeeping of prisoners, like by providing medical care, and his  
5 allegations that BOP officials improperly calculated the length of his sentence.

6 Even if Portillo’s alleged state-created duty existed and applied in these circumstances,  
7 the FTCA is not a vehicle for claims based on state laws that impose liability on municipalities,  
8 states, or public employees.<sup>21</sup> It waives immunity for torts that *private* individuals in like  
9 circumstances can be held liable for. And Portillo provides no authority to suggest that there is a  
10 private analogue to the D.C. Code provision he references or to the BOP actions he complains  
11 of—perhaps because there isn’t one.

12 A similar case from the Second Circuit is informative. In *McGowan v. United States*,  
13 McGowan, after a lengthy incarceration in federal prison for arson, was transferred to a  
14 Residential Reentry Center in Brooklyn, New York.<sup>22</sup> From there he published an article on the  
15 Huffington Post website under his own byline.<sup>23</sup> Shortly after the article appeared online, the  
16 Residential Reentry Manager at the BOP determined that McGowan had violated a prison  
17 regulation prohibiting prisoners from posting articles with their names in the byline, and  
18 remanded him back to federal prison for the violation.<sup>24</sup> Unbeknownst to the manager, the BOP  
19 had rescinded that particular regulation as a result of a successful First Amendment challenge in  
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21 <sup>19</sup> See D.C. Code § 24-211.02.

22 <sup>20</sup> See *Herbert v. District of Columbia*, 691 A.2d 1175 (D.C. 1997), *reh’g en banc granted*,  
23 *judgment vacated*, 698 A.2d 1017 (D.C. 1997), *opinion reinstated in part on reh’g*, 716 A.2d 196  
24 (D.C. 1998).

25 <sup>21</sup> *United States v. Olson*, 546 U.S. 43, 45–46 (2005).

26 <sup>22</sup> *McGowan v. United States*, 825 F.3d 118, 122 (2d Cir. 2016).

27 <sup>23</sup> *Id.*

28 <sup>24</sup> *Id.*

1 federal court.<sup>25</sup> Once the manager was told of the mistake, she expunged the violation and  
2 transferred McGowan back to the residential reentry center.<sup>26</sup>

3 McGowan sued the United States under the FTCA for negligence and false imprisonment.  
4 McGowan argued that wrongful confinement, a tort that runs against municipalities and their  
5 employees under New York law, was analogous to his false-imprisonment claim.<sup>27</sup> The Second  
6 Circuit held that there was no private analogue for such a tort, because “private persons cannot  
7 establish facilities to detain other persons—only the government can, either on its own or through  
8 a governmental contractor. In short, there is no circumstance in state tort law that is analogous to  
9 the situation here.”<sup>28</sup>

10 Portillo’s claim suffers from the same defect as McGowan’s. The authority to detain  
11 other persons and determine the length of their sentences is a uniquely governmental function  
12 that has no private analogue. Portillo does not offer, and I cannot imagine, any like  
13 circumstances that would expose a private individual to tort liability. Both of Portillo’s claims  
14 suffer from this defect, as he uses the BOP’s failure to follow Judge Lamberth’s order and its  
15 subsequent miscalculation of his sentence as the factual assertion underlying both claims. Any  
16 leave to allow him to replead an FTCA claim would be futile because Portillo can add no facts  
17 that would transform the BOP’s actions into ones that have a private analogue. Because  
18 Portillo’s complaint does not properly fall under the FTCA, the United States has not waived  
19 sovereign immunity under the FTCA, and I therefore lack subject matter jurisdiction over his  
20 lawsuit. Because I lack jurisdiction and dismiss on this basis, I do not consider the BOP’s  
21 alternative arguments for dismissal.

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24 <sup>25</sup> *Id.*

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26 <sup>26</sup> *Id.*

27 <sup>27</sup> *Id.* at 126.

28 <sup>28</sup> *Id.* at 127.

1 **Conclusion**

2 Accordingly, IT IS HEREBY ORDERED that defendants' motion to dismiss [ECF No.  
3 **22] is GRANTED**, and this case is **DISMISSED** for lack of jurisdiction. The **Clerk of Court** is  
4 directed to **CLOSE THIS CASE**.

5 DATED: January 22, 2018.

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7 U.S. District Judge Jennifer A. Dorsey  
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